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IN THE
Supreme Court of The United States

MICROSOFT CORPORATION,
PETITIONER,
v.

CORRECTED COPY

AT&T CORP.,
RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* WISCONSIN ALUMNI RESEARCH FOUNDATION, RESEARCH CORPORATION TECHNOLOGIES, INC., AND THE REGENTS OF THE UNIVERSITY OF CALIFORNIA SUPPORTING RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are universities and an independent technology management company whose research and development investments provide technological advances in many fields, including computer science, biology, chemistry, and engineering. Research and development in each of these fields is endangered by the worldwide piracy of valid intellectual property. While much of the piracy is practically, if not legally, difficult to prevent, establishing legal precedent based on Petitioner's arguments would give license for infringers to circumvent U.S. patent rights worldwide.

The academic sector drives research and innovation in this country. In 2004, academic institutions spent $42 billion on research and development of which 54% was spent on basic research—the lifeblood of technological advancement. In 2003, the federal government supplied 62% of the funds for academic research and development expenditures while the institutions themselves contributed 19% of the funds. Industry supplied less than 7% of such funds.[2]

Innovation, defined from the university perspective as the translation of basic-research results to products or processes in the marketplace, is made possible through, and has been dramatically improved by, the Patent and Trademark Law Amendments of 1980, 35 U.S.C. §§ 200-212, commonly known as the Bayh-Dole Act, and its implementing regulations, 37 C.F.R. § 401. Congress passed the Act in 1980 to spur research in the academic sector and

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[1] The parties filed letters of consent to the filing of *amicus* briefs in support of either party with the Court on November 30, 2006, pursuant to Rule 37.3. Pursuant to Rule 37.6, *Amici* state that no person or entity other than *Amici* or their counsel authored this brief in whole or in part or made a monetary contribution to its preparation or submission.

[2] For the figures in this paragraph, *see* National Science Foundation, *Science and Engineering Indicators 2006*, available at http://www.nsf.gov/statistics/seind06/c5/c5h.htm.

promote university-industry collaborative relationships that ensure that the fruits of university research reach and benefit the public.

Before this Act, government agencies kept title to inventions that had been funded with federal money. Consequently, few invention disclosures were made to universities. Without the Bayh-Dole Act and the patent protections that it provides, much of the academic sector's research and development would languish because private companies would be reluctant to invest in the development of products, fearing that others would free-ride and receive the benefits of the invention without having made the investment in it.

Amicus Wisconsin Alumni Research Foundation (WARF) was founded in 1925 as a nonprofit entity to promote, encourage, and aid scientific investigation at the University of Wisconsin-Madison. One of WARF's first accomplishments was to patent a vitamin D discovery that eventually eliminated the childhood disease rickets worldwide. Since its founding, WARF has processed approximately 4,800 inventions created by UW-Madison faculty and staff, obtained 1,540 U.S. patents on these inventions, entered into over 1,390 license agreements with companies around the globe, and returned $800 million in licensing-fee income to UW-Madison to fund research programs and initiatives.

The Bayh-Dole Act has made it possible for WARF to make the contributions to the public good that it does today. In the middle to late 1960s, government agencies kept title to inventions that had been funded with federal money. As a consequence, invention disclosures to WARF—inventors' write-ups for patent counsel to use in preparing patent applications—had fallen to barely one per month and what few disclosures there were had fallen in quality. The

situation improved somewhat when Institutional Patent Agreements (IPAs) were negotiated with (what is now) the Department of Health and Human Services in 1968 and the National Science Foundation in 1973. These IPAs gave WARF (and other universities) the right to elect to take title to inventions made with funds from those two agencies.[3]

Since the enactment of Bayh-Dole, invention disclosures to WARF have mushroomed. Today, WARF (a) manages over 720 pending and 880 issued U.S. patents on UW-Madison technologies, as well as 1,920 foreign equivalents; (b) offers more than 3,800 technologies for licensing; (c) maintains more than 940 active commercial license agreements, as well as 460 academic licenses; (d) has over 160 license agreements with Wisconsin companies; and (e) holds equity in 40 UW-Madison spin-off companies. WARF's most important patents include the blood anticoagulant Warfarin, a coating process making pills easier to swallow, treatments for osteoporosis and cancer, magnetic resonance techniques, and a discovery known as the "Wisconsin Solution" that prolongs the use of transplant organs.

Amicus Research Corporation Technologies, Inc. is an independent technology management company that has been involved in providing commercialization services to academia and other institutions since its founding in 1912. It has been pivotal to the success of many important pharmaceuticals, diagnostics, biotechnology products, and new materials and processes. Recent products include three in the cancer area: the widely used therapeutic compounds Cisplatin and Carboplatin, and the PSA (Prostate Specific Antigen) test for diagnosing and monitoring prostate cancer.

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[3] The IPAs were evolutionary steps that led to the Bayh-Dole Act which largely codified IPA provisions.

Amicus Regents of the University of California is a party in *Eolas Techs. Inc. v. Microsoft Corp.*, 399 F.3d 1325 (Fed. Cir. 2005), a case relied upon in part by the Federal Circuit in the present case. But its interests are broader. It provides for technology transfer to commercial markets from ten campuses and five medical schools in the State, from two national laboratories directly operated by the University of California system, and one national laboratory operated as a joint venture with the University as a partner—all three on behalf of the U.S. Department of Energy. Currently, there are more than 3,000 ongoing research projects supervised by 13,000 principal investigators.

In the last ten years alone, these efforts have resulted in three Nobel prizes and a distinguished list of innovative research discoveries in biochemistry, bioengineering, cell biology, disease procedures, developmental biology, endocrinology, genetics, immunology, neurobiology, oral biology, pharmacy, and pharmacology. But the one area of technology that permeates all other areas of research is computer science. For instance, scientists from the University of California provide software tools for analyzing genomics and proteomics data and apply such tools in other areas of computer science.

Yet the advances in software engineering that often start out at research institutions reach far beyond the walls of academic labs. Today, individuals use software in their daily lives regardless of their profession: "surfing," shopping, trading, and researching on the Internet; making calls and keeping their calendars on cell phones; and catching moments on digital cameras are just some of the ways advances in software technologies have become integrated in our society's fabric.

But concern for this "innovative ecosystem," in which information technology has fueled growth and innovation in

nearly every facet of our economy and society, is growing in light of economic growth in China and India.[4] In order to remain competitive with the research and development that is burgeoning abroad, universities rely heavily on the protections of the United States' patent system. It is those protections that enable universities to commercialize their research so that it reaches the public and does not languish unused behind academic walls. Further, those protections allow universities and small businesses, either under the auspices of the Bayh-Dole Act or otherwise, to position themselves for competition not only in the United States, but in a global economy, imparting a measure of protection for the job base in the United States.

Under Petitioner's reading of 35 U.S.C. § 271(f), however, the academic sector's ability to commercialize its ideas and innovations for the public benefit is jeopardized. If Petitioner's theory prevails, an infringer may take a software component of a patented invention abroad and supply infringing units abroad unfettered by the statutes set up to prevent exactly that.

The result for research universities—and any entity that invests in these types of inventions—is that their investment in such technology will be radically devalued with one release of the component that is later taken (or just electronically transmitted) abroad. Moreover, that export would be tantamount to subsidizing foreign manufacturers and foreign competition. If this Court condones the ability of infringers to circumvent a United States patent by distributing a self-supplying component abroad, much of the black-market piracy that already deprives universities and

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[4] *See* The National Academies, Computer Science and Telecommunications Board Projects: *Assessing the Impacts of Changes in the Information Technology Research and Development Ecosystem*, available at http://www7.nationalacademies.org/cstb/project_ecosystem.html.

corporations of valued R&D returns will be legitimized. This will deter commercial investment and stifle innovation on these types of technology, defeating the objective of the Bayh-Dole Act.

Amici submit this brief to provide the Court with an academic-sector perspective on the effects of Petitioner's position—which would effectively exempt patented software inventions from Section 271(f) by giving that section an unnatural reading. This brief focuses on why the Federal Circuit correctly applied the plain language of the statute to the specific facts before it and on why Petitioner's interpretation would give license to worldwide foreign piracy of certain patented technology.

SUMMARY OF ARGUMENT

The software at issue in the present case fits squarely within the plain language of Section 271(f), as the software is a "component" that is "supplied from" the United States and "combin[ed]" with the hardware abroad to form the "patented invention." First, software can be a component of a patented invention—the Government, Judge Rader, and even Microsoft agree on this point. Second, the software component is the program content (the object code that is the set of instructions or operational procedures that are the program). And that content is unquestionably "supplied from" the United States. Third, Microsoft's and the Government's concessions demonstrate that, even if this Court were to construe the "component" as the physical embodiment of that software (the structure that the software renders on a computer's memory), rather than the content, that software is still "supplied from" the United States.

Microsoft's core submission—that foreign copies of its Windows software (made from either a golden master shipped from the United States or an electronic transmission

sent from the United States) cannot be "supplied from the United States"—is wrong. It ignores the natural understanding of what a software component (to be combined with hardware) is—namely, the content of the code that is combined with computer memory when it is loaded onto a computer, as the United States tacitly recognizes. U.S. Br. 25 n.2. And it contradicts Microsoft's crucial admission—namely, that it "*supplies* its Windows operating system object code *from the United States* . . . by sending . . . a single encrypted transmission of the object code." J.A. 31 ¶7 (emphases added). With encrypted transmissions, the end result is another copy of that code rendered in a foreign country, yet Microsoft concedes that that copy is a "component" that was "supplied from the United States." *Id.*; Pet. Br. 34, 35. That concession, along with others (by Microsoft and the United States), destroys the premises of the effort to avoid Section 271(f)'s natural application to the software here.

ARGUMENT

I. It Is Undisputed That Software Can Be A Component And Is Combined With Hardware To Create A Patented Invention Consisting Of A Computer That Performs Certain Functions Enabled By That Software.

There is no dispute that software can be a "component" that is "combin[ed]" with hardware to create a patented invention covered by Section 271(f). Even the Government and Judge Rader agree with Respondent on this point. U.S. Br. 10-16; *AT&T Corp. v. Microsoft Corp.*, 414 F.3d 1366, 1372 (Fed. Cir. 2005) (Rader, J., dissenting). Indeed, the United States agrees with Respondent that "physically placing an actual, machine-readable copy of the Windows object code in a computer to complete the patented system does combine that software copy with the other

components so as to make the patented invention." U.S. Br. 15-16.

And even Microsoft concedes this point. It states that it "agrees with the United States that the computer-readable and -executable 'software copy that is actually loaded onto [a] computer[]' may be a 'component of a patented invention' under Section 271(f)." Pet. Br. 37 (quoting U.S. Cert. Br. 8). Likewise, Microsoft "agrees with the United States (U.S. Cert. Br. 8) that physical media containing the machine-readable object code, combined with a general purpose computer to perform the functions of a special purpose speech coding device, could constitute a component of AT&T's Digital Speech Coder invention." Pet. Br. 34 n.9.

Microsoft attempts to escape these concessions by mistakenly treating the software here as "no different from the design information one may glean from blueprints, recipes, computer program listings, and patents." *Id.* at 38-39. That is wrong. As a matter of ordinary usage, a blueprint for construction is not a "component" of the item created by carrying out the blueprint's instructions. Nor is a blueprint "combin[ed]" with anything to render a patented invention. Software, on the other hand, is both considered a "component" and is "combined" with the computer or other medium, and for good reason.

The computer-readable program code (the software on Microsoft's golden master) is *not a set of instructions to people* on how to build the patented invention; rather, when *combined* with the hardware component, the code *remains on* the computer on which it is installed as "instructions" (using Microsoft's locution) for that hardware to continue using. The computer continues to "use" the software it contains, making the computer usable in a way that is "new and useful." *See In re Bernhart*, 417 F.2d 1395, 1400 (C.C.P.A. 1969); *see also In re Alappat*, 33 F.3d 1526, 1541-42 (Fed.

Cir. 1994). And the software can be separated, removed, or *uncombined* from the other component of the invention—the hardware—without destroying the latter.

"Design instructions," in Microsoft's generic sense of instructions to people on how to build the infringing product, are very different. Most importantly, they are not "combin[ed]" with any other component to create an infringing product. The design instructions to people on how to make a product do not remain with the product after it is fabricated; the "design instructions" are exhausted vis-à-vis that product once the product is made. A recipe is exhausted vis-à-vis the dish it tells the cook how to make; the recipe is not a component (ingredient) of the resulting dish for eaters to use. Software, on the other hand, when physically embodied on hardware after being installed, remains *combined* on the hardware in order to be read and used in the use of that hardware and can be separated from that hardware by uninstalling the software.

There are potentially two different ways that a software component can be described: it could be the *content* (the object code that is the instructions or operational procedures that are the program) or, more narrowly, the physical embodiment of that content in the molecules of the computer memory. Either way, Microsoft's argument fails. As the next section of this brief explains, the software-as-content understanding of the "component" being "combin[ed]" is the natural meaning of the terms of Section 271(f)—which defeats Microsoft's argument, because there is no dispute that the software (as content) here was supplied from the United States. But, as Section III *infra* explains, even if this Court adopts the narrower alternative of software-as-physical-embodiment-of-the-content that Microsoft and the United States urge, the result under Section 271(f) is still the same because that component was

"supplied from" the United States, as Microsoft's and the Government's concessions establish.

II. The Software Component Of A Programmed-Computer Invention Is The Intangible Content (The Set Of Instructions Or Operational Procedures) That Is Combined With The Computer To Form The Infringing Product.

The natural understanding of the software component of a programmed computer invention is the content of the program that is combined with the hardware by loading the code onto the computer's memory.

That understanding is implicit, first of all, in Microsoft's own Question Presented, which asks whether the "*intangible* sequence of '1's' and '0's'" is a component. Pet. for Cert. i (emphasis added). The references to "intangible" and also to 1s and 0s (which are not physical entities) necessarily recognize that it is the content—the "object code" represented as the sequence of 1s or 0s—that is the software at issue.

The software-as-content understanding is also implicit in the crucial concession that the United States makes in an effort to reconcile its position before this Court with the natural understanding as to software in computers: "[i]f petitioner sent copies of its Windows software from the United States to a foreign country and those copies *were loaded* onto computers, petitioner would likely be liable under Section 271(f) for each such infringing copy." U.S. Br. 25 n.2 (emphasis added). That statement necessarily admits that a "combination" occurs between the software and the computer hardware by loading the software onto the computer—otherwise, there could not be the liability that the Government acknowledges.

A "combination" of components, however, cannot occur unless the "components" being combined already exist. With software, it is the *content* of the software that pre-exists the loading process, not the physical embodiment of that content first created *by* the installation. Loading of software onto a computer, moreover, refers to making a *new* copy on the computer (*e.g.*, in the random access memory), not physically inserting a copy from outside the computer into the computer for the computer to use *that* copy—as Microsoft itself acknowledges. Pet. Br. 4 n.2 (installation inherently involves transferring content to make a new copy). It is thus the content of the software that is being combined with the memory or storage medium of the computer. Thus, the logical conclusion of the Government's admission is that it is the software's content that constitutes the "component," and not the physical embodiment that exists after the installation process.

Furthermore, nothing in the ordinary meaning of "component" limits the term to machines or physical structures. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 466 (3d ed. 1986); THE AMERICAN HERITAGE DICTIONARY 387 (3d ed. 1992). And with respect to computer software particularly, it is ordinary usage of patentees, courts, and the PTO to describe software as a "component" of the computers of which it is a part. *See, e.g.*, *Netword, LLC v. Centraal Corp.*, 242 F.3d 1347, 1351 (Fed. Cir. 2001) (patent claim describes "computers" and their "software components"); *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1326 (5th Cir. 1976) ("The final component of the computer system is the application software."); U.S. Patent No. 6,629,151 (filed Dec. 8, 1999) (col. 17, l. 66-col. 18, l. 1) (Microsoft's patent claiming a "wireless network hardware component connected to a computer and a software component on the computer"); PTO, Manual of Patent Examining Procedure § 2106.01 at

2100-24 (8th ed. 3d rev. 2005) [hereinafter MPEP] (discussing elements "at least partially comprised of a computer software component"); MPEP § 2106.02 at 2100-25 (discussing "systems which include a computer as well as other hardware and/or software components"); *see also* MPEP § 2106 at 2100-13 ("a claimed computer-readable medium encoded with a data structure defines structural and functional interrelationships between the data structure and the computer software and hardware components which permit the data structure's functionality to be realized").

Thus, when the software on Microsoft's golden master and encrypted transmissions is installed on hardware abroad, a "combination" of "components" occurs within the meaning of Section 271(f). *See* MPEP § 2106 at 2100-14 (a "hardware and software combination . . . defines the statutory product.") (citations omitted). The term "combine" requires no physical joining of tangible components. THE AMERICAN HERITAGE DICTIONARY 377; WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 452.

And as the Government explains, a "'component' is a constituent part; element; or ingredient of an invention that is combined with the other parts, elements, or ingredients to form the completed invention." U.S. Br. 11. In the present case, it is the patented software's ability to digitally record speech that is the essence of the present invention—not the physical shape that the molecules happen to take once the code is installed on the computer-usable medium. For instance, if the physical embodiment of the code were altered in such a way that the claims of the patent were still met, it would still constitute the patented invention. Thus, the most common-sense reading of the term "component" refers to the content (the instructions of the software), not its physical embodiment or shape once installed.

The content, furthermore, is indisputably "combin[ed]" with the hardware component "outside the United States in a manner that would infringe the patent if such combination occurred within the United States." And, as Section 271(f) requires, Microsoft *intends* that its domestic work—the content of the software code—be combined into the final infringing products. *See* 35 U.S.C. § 271(f)(1) ("[I]n such a manner as to actively induce the combination of such components."); 35 U.S.C. § 271(f)(2) ("[I]ntending that such component will be combined.").[5] In shipping the golden master and electronically transmitting its Windows code abroad precisely in order to have its Original Equipment Manufacturers (OEMs) install the software they contain on multiple computers and hardware, Microsoft is doing just what Section 271(f) was intended to cover.

III. Even If The Software Component Of The Programmed Computer Is Viewed As The Physical Embodiment Of The Content (The Arrangement Of Molecules In The Computer Memory), That "Component" Is "Supplied From" The United States Because Nothing But Copying Of U.S.-Made Code Is Involved In The Installation.

A. Even if the Court accepts Microsoft's and the Government's narrow software-as-physical-embodiment view of the software "component," their argument for escaping Section 271(f) collapses. The argument is conclusively refuted by the concessions they rightly make in an effort to try to reconcile their position with the common-

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[5] For this reason, fears of "open-ended liability" (U.S. Br. 29) are overstated. Microsoft would only be held liable for those copies it *intends* to have made—the copies from which it receives licensing royalties. Thus, Microsoft's liability is limited as it is directly tied to Microsoft's ability to profit from the infringing product.

sense usage that software is combined with memory to become a component of the operational computer.

The position of Microsoft and the Government—that a component can only be supplied from a country in which the molecules have been physically present—is disproved by Microsoft's and the Government's own admissions. Microsoft admits that it "*supplies* its Windows operating system object code *from the United States* to certain foreign OEMs and authorized foreign replicators by sending to foreign OEMs or replicators a single *encrytpted transmission* of the object code." J.A. 31 ¶ 7 (emphases added). But the encrypted transmission, transmitted electronically to a computer abroad, results in another copy of the code on that foreign computer—a copy that was never physically present in the United States. And yet Microsoft agrees that that code was supplied "from the United States." *Id.* Indeed, it has further conceded that "*other than* the 'golden master disks' and *the encrypted transmissions of Windows object code*, Microsoft does not supply any '*component*' from the United States for assembly abroad." J.A. 32 ¶ 10 (emphases added); *see* Pet. Br. 34. That concession acknowledges that the object code created by the electronics at the receiving end of the transmission is actually a "component" of the invention at issue, a computer programmed with that object code.

Similarly, the United States concedes that "[i]f petitioner sent copies of its Windows software from the United States to a foreign country and those copies *were loaded* onto computers, petitioner would likely be liable under Section 271(f) for each such infringing copy." U.S. Br. 25 n.2 (emphasis added). But loading or installing software, as Microsoft concedes, inherently involves making a new copy. Pet. Br. 4 n.2. Yet the Government concedes that an infringing party doing so would "likely be liable under Section 271(f) for each such infringing copy." U.S. Br. 25.

Because there is no relevant difference between electronically transmitting the computer code from the United States (which entails a copy arriving electronically abroad) and installing that code from a golden master (which also results in a copy), these concessions destroy Microsoft's and the Government's premise.

B. All parties agree that when used as a verb, the word "supply" is defined as "to furnish or provide." RANDOM HOUSE UNABRIDGED DICTIONARY 1912 (2d ed. 1993); *see also* Pet. Br. 14. Neither of these definitions limits the method by which the act of supplying must occur. Indeed, both of these definitions can be used to describe Microsoft's distribution of its Windows code via a golden master.

Microsoft's critical admission again defeats its argument: it "*supplies* its Windows operating system object code *from the United States* to certain foreign OEMs and authorized foreign replicators *by sending* to foreign OEMs or replicators a single encrytpted transmission of the object code." J.A. 31 ¶ 7 (emphases added). Microsoft did not just stipulate that it supplies the *encrypted transmission* from the United States. Rather, it supplies the *Windows code* from the United States and its method of supplying that code from the United States is *by sending* the encrypted transmission. *Id.*

Furthermore, and contrary to Petitioner and its *amici*'s contention that "petitioner is subjected to open-ended liability in the United States 'for products *manufactured entirely abroad*,'" (U.S. Br. 29 (quoting Rader, J., dissent at Pet. App. 11a) (emphasis added)), all that is accomplished abroad is the installation of the patented software. Microsoft admits that it "conceives, writes, compiles, tests, debugs and creates" that software in Redmond, Washington. J.A. 31 ¶ 4; Pet. App. 46a ¶ 4. The software was sent abroad for nothing

more than the final step of assembly: installation on a computer or other medium. And Microsoft agrees that "Section 271(f) applies in the situation where 'everything was accomplished in this country except putting the pieces together as directed.'" Pet. Br. 39 (quoting *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 533 (1972) (Blackmun, J., dissenting)). The installation process, which even Microsoft concedes inherently involves an act of duplication (Pet. Br. 4 n.2), is how the pieces of binary software and computer hardware are put together as directed. And that is the only step that is completed abroad.

The plain meaning of the term "supply"—showing that it is not limited as Microsoft and the Government suggest—is further supported by this Court's holding in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), inappropriately relied upon by Microsoft. Pet. Br. 15. *Sony* recognizes that, when a consumer uses a Sony-sold video-recording machine to record an off-the-air movie or television program, the *content providers* (in that case respondents Universal Studios and Walt Disney Productions), not the hardware providers (in that case petitioners Sony Corp. and Sony Corporation of America), are "supplying" the program (the "work") to the consumer by allowing television networks to broadcast their programs. *Sony*, 464 U.S. at 436 ("Petitioners in the instant case do not supply Betamax consumers with respondents' works; respondents do.") The Court in *Sony* used perfectly commonplace usage. Under that usage, the content providers supplied the millions of copies received by consumers even though the individual copies were never in the content providers' hands, and moreover, they may have had just *one* copy in initiating the transmission. That is the ordinary use of the word "supply" in the context of content being copied, and it covers this case.

The meaning, indeed, is even clearer under Section 271(f) because "supply" does not stand alone in the

provision: the phrase is "supplied *from*." The phrase refers, not to where the copy on the computer is created, but to where it comes *from*—to its origin at a prior stage. Where the copy is nothing but the result of installing content, the place where the finally-formed content is sent out for nothing more than installing on a medium is where it is supplied from.[6]

Yet, without any support for its argument, Microsoft insists that the term "supplied" requires absolute congruity between what is initially transmitted and what is ultimately acquired through that transmission. In his dissent, Judge Rader similarly argued that "[a]s a matter of logic, one cannot supply one hundred components of a patented invention without first making one hundred copies of the component, regardless of whether the components supplied are physical parts or intangible software." *AT&T Corp.*, 414 F.3d at 1373. But these contentions miss the mark. They ignore the word "from" that follows "supplied"; they disregard Microsoft's concessions about the electronic transmission and supplying the code by sending the golden master; they disregard the Government's concession about individual copies; and they violate the usage of even "supply" alone as reflected in *Sony*.

C. Not only does logic undermine Microsoft's contention, Microsoft itself undermines it own contention. If Microsoft places one copy of Windows on a server in the United States and invites anyone around the world to download it, it is "supplying" that software worldwide, regardless of the fact that it started out with just one copy.

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[6] With only routine and perfect almost-instantaneous copying involved in installation, any blame (or credit) for any bad (or good) quality of the component in the final patented invention squarely resides with the Microsoft employees in the United States who completed the code sent out (by golden-master shipping or electronic transmission) for installation.

Likewise, when Microsoft sends its encrypted transmission from the United States to foreign OEMs, it admits that that transmission is "supplied from the United States." Pet. Br. 35. Thus, if the first copy of software that arrives via encrypted transmission is supplied from the United States, so too are all subsequent copies. It does not matter whether the physical source for installation is 1,000,000 separate disks for 1,000,000 separate computers; a single disk used 1,000,000 times to load the software onto 1,000,000 computers; or a single encrypted transmission, transmitting the software to 1,000,000 computers (simultaneously or seriatim). Regardless of where the installation occurred, the software code that is installed on the foreign medium via the golden master or the encrypted transmission was "supplied from" the United States.

When it suits its interests, even Microsoft acknowledges that the number of units it supplies is not limited by the number of golden masters it sends abroad. In *Microsoft Corp. v. Comm'r of Internal Revenue*, Microsoft argued that it was entitled to tax deductions under 26 U.S.C. § 927(a)(2)(B) for all foreign sales of software replicated from Microsoft's golden master abroad, claiming that such copies were "export property" under the statute. 311 F.3d 1178 (9th Cir. 2002). The Ninth Circuit, while recognizing that purely "intangible intellectual property" was not "export property," *id.* at 1185, agreed with Microsoft that all copies created from the golden master were export property, thereby providing Microsoft with another $31 million in claimed deductions for 1990 and 1991. *Id.* at 1182, 1189. Thus, just as golden-master copies of software are "exported" from the United States, they are likewise "supplied from" the United States.

Under any common-sense definition of "supplied from," the software that foreign OEMs install from either Microsoft's golden masters or its encrypted transmissions is

"supplied from the United States" and is subject to Section 271(f).

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In the end, Microsoft's position is a misdirected effort by the information technology industry (or one of its major components) to change patent law to satisfy its own perceived technological needs. In resisting the common-sense application of the statutory language to software, Petitioner is seeking a special rule for information technology, as opposed to other technology, without going through the required process of legislative debate and action. A basic and longstanding feature of the patent statute, however, is neutrality among technologies, except where Congress enacts particular provisions for particular technologies. There are no such provisions here, and so the natural meaning of the general statutory language applies. The language refutes Petitioner's position.

Microsoft and its *amici* have made policy arguments for limiting the infringement protection under Section 271(f), a statute designed for just what is occurring here—namely, taking all but the last step for infringement in the United States, then sending the result abroad for the trivial task of electronic mass reproduction. But such policy arguments are presented in the wrong forum. There plainly are strong countervailing policy arguments against just the kind of exploitation of domestic inventors that Section 271(f) targets. For academic institutions like *amici*, the protections of Section 271(f) have been and remain of particular importance. If Microsoft wants to end those protections for itself and other commercial sellers of software, it should make its case to Congress, which can fully air and scrutinize the policy debate. In the meantime, the coverage of Microsoft's software in this case is a straightforward

application of the statutory language in direct furtherance of the statutory policy.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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